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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 613

ADAM CLAYTON POWELL, JR.,

Petitioner,

v.

ESTHER JAMES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

HENRY R. WILLIAMS,
GEORGE D. COVINGTON,
Attorneys for Petitioner,
271 West 125th Street,
New York, N. Y. 10027.

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Adam Clayton Powell, by his attorneys, Henry R. Williams and George D. Covington, Esquires, respectfully petitions that a Writ of Certiorari issue to review the mandate of the Court of Appeals of New York entered on July 10, 1964.

Opinions Below.

The Per Curiam opinion of the Court of Appeals is to be found in the appendix to this petition. This is the final judgment in the State of New York, where judgment was entered for the plaintiff, affirming the judgment of

the Appellate Division of the Supreme Court, First Judicial Department, which rendered a memorandum decision for a new trial unless the plaintiff agreed to a reduction of the jury's grossly excessive verdict to $11,500.00 as compensatory damages and $35,000.00 as punitive damages.

Jurisdiction.

The judgment of the Court of Appeals of New York was dated July 10, 1964. The jurisdiction of this court is invoked under the Act of June 25, 1948 c. 646, 62 Stat. 929, 284, S. C. 1257(3), since the rights of the petitioner under the United States Constitution are here involved. The Court of Appeals of New York is the highest Court of that state.

Questions Presented.

A. Did the Court of Appeals of New York err in affirming the judgment of the lower Court which held that the state libel law may be applied to limit the freedom of speech of a member of the United States Congress where such expressions are in the pursuit of his duties of public office.

B. Is a member of the United States Congress privileged for statements made pursuant to the performance of his public duties.

Statement of the Case.

Petitioner is a Congressman for the State of New York, Sixteenth Congressional District and is Chairman of the House Committee On Education And Labor, as he was at the time of the utterance of which Respondent complained.

For sometime prior to the evening of March 6th, 1960, the Petitioner had made a series of speeches in the United States Congress with regard to collusion between gangsters and the Police Department of the City of New York, the corruption of children by the use of number of collection of neighborhood groceries for "number drops". All of the speeches were printed in the Congressional Record, and some contained reference to Respondent as a "bag woman" for the police of the Department. As a result the speeches were widely circulated and created newspaper and editorial comment.

The speeches referred to were the result of letters addressed to public officials, copies of which were sent to Petitioner in his official capacity. In essence, the first letter referred to stated that the writer, subsequently identified as Halston Patterson, went to the office of one John Walsh, Supervision Assn. Chief Inspector of the Police Department, and related to the police officers that Respondent was being paid by one Frederick, Patterson's partner, to prevent Respondent from exposing their gambling activities.

Patterson gave the name of other gamblers who were paying the Respondent for the same purpose. The letter stated that the "little gamblers" were called in by the police and admitted that Respondent extorted money from them under threat of exposure.

The first letters stated furthermore that although an investigation was undertaken it was later frustrated by Assistant Chief Inspector James Nidds, who, the letter alleged, was himself involved in sheltering the Respondent on account of Nidds' employment of respondent as an informer against gamblers.

A second letter stated that the "little gamblers" were convinced that Nidds, the police inspector, was attempting

to destroy them because of their competition with a large crime syndicate. Nidds, the letter alleged, protected the crime syndicate against exposure.

Petitioner appeared on the television program on March 6, 1960, in response to an invitation (R. 250), without any fee (R. 89), without previous rehearsals (R. 251-2), and without the usual publicity because he was a last minute substitute for Senator George Humphreys (R. 249). The program was carried only over Channel 13, New York City, which is generally designated as an educational station with a limited audience regardless of the viewing time.

In the unrehearsed interview, the moderator of the program queried Petitioner upon his speeches in Congress and his "war" on corruption in the Police Department of the City of New York. In the course of the said interview Petitioner admitted his speeches concerning policy, graft, the syndicate and policy, and police corruption for the past three months, and stated, as set forth 19-21 of the record, as follows:

> "Well there is a woman named Esther James who is a bag woman for the Police Department in Washington, and the gamblers themselves made a complaint in person in August to the Police Department about her and nothing was done. They sent a letter to Inspector Walsh on September 9th of last year complaining about her and in the letter they said—and I quote from the letter which was sent to the New York State Crime Commission—I have a copy of it—that Esther James said: "You're not going to be able to touch me because if I tell the truth, then all of these policemen and the brass that have been getting this payoff that I collect from them, they will be then prosecuted for income tax evasion—so they are not going to do anything with me, and its just that simple."

Respondent voluntarily identified herself as the Esther James mentioned in the foregoing quote from the television program, although submitting no proof of the fact, and alleged that she was defamed and damaged by the comment on the television program, but made no claim for damages by reason of the prior utterance of the same remark in the United States Congress and in the Congressional Record.

In his second and third affirmative defenses Petitioner alleged that the utterances by him on the said television program were an extension of his Congressional Record and was in the nature of a report made, bona fide and without malice, to his constituents and the interested members of the general public of similar remarks previously made in Congress, that the utterances were general observations concerning the state of organized gambling, and related corruption of some member of the Police Department of the City of New York, and were made in discharge of Petitioner's duty to disclose to the general public conditions which vitally affected their welfare.

The Respondent has admitted that the remarks of which she complains were previously set forth in the Congressional Record, and that as a result thereof the Respondent was subjected to inquiry by several commissions, yet she has restricted the trial solely to the utterances made on television.

The Respondent also admitted that she had never met and did not know the Petitioner (R. 319); that she had been shot because of her interest in gambling (R. 770); that she had been convicted of a crime on at least two occasions, one of which was an assault with a dangerous weapon (R. 392-3); and that she had lied about such convictions on her application for naturalization (R. 402, *et seq.* and 423, 426).

In support of her claim for damages, the Respondent produced character witnesses, none of whom had dis-

cussed her character with other members of the community (R. 144, 157, 179, 192 and 196), and loss of earnings as an apparent part-time maid (R. 3[illegible]7). She produced no proof that she was the person indicated in the utterances complained of by her, other than the apparent similarity of name.

Petitioner in his testimony in the Examination Before Trial taken by the Respondent stated that he did not know and had never met Respondent, and that he had no malicious motive in making allegedly slanderous utterances (R. 86).

Respondent offered no evidence of malice on the part of Petitioner in making the alleged slanderous remarks.

Reasons for Granting the Writ.

A. The judgment handed down by the highest Court of the State of New York limits the freedom of expression of a citizen and a member of the United States Congress and is therefore unconstitutional as a violation of the First and Fourteenth Amendment. It is clear that the action of the State is here involved since, though this is a law suit between private parties, the New York Courts have applied a state rule of law which imposes invalid restriction upon Petitioner's constitutional freedom of expression. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 265.

This Court has decided no case where it has "sustained the use of libel law to impose sanctions upon expressions critical of the official conduct of public officials" *New York Times Co.* v. *Sullivan, supra,* 268. Moreover, this Court has made it clear that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. *Beauharnais* v. *Illinois,* 343 U. S. 250, 263.

This Court has stated that the constitutional safeguard of free speech "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *U. S.*, 354 U. S. 476, 484.

This Court has pointed out "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include the vehement, caustic, and sometimes unpleasantly sharp attacks on government public officials." *New York Times Co.* v. *Sullivan, supra,* 270.

A state rule of law is not saved by its provisions of defenses for libel where the defenses are not an adequate safeguard to freedom of expression. *New York Times Co.* v. *Sullivan, supra,* 278.

Petitioner in his brief before the Court of Appeals of New York raised the defense of qualified privilege against libel. Since the Court of Appeals decided against the petition it must be inferred that the Court of Appeals did not sustain the defense in this case.

In view of the absence of a legal defense to protect Petitioner in circumstances in which Petitioner must speak freely in order to hold his public office responsibly, the defenses provided by this state law as applied in this case by the Court of Appeals of New York are not sufficient.

The facts did not support a finding of actual malice. The records indicate that Petitioner is a member of the United States Congress; that the allegedly slanderous statements were previously made by him on the floor of the U. S. House of Representatives; that he did not know the Respondent; that the statements made were matters of vital public interest and concern; that they were statements which Petitioner had a duty to the public to disclose; that the statements were made in good faith and in dis-

charge of his duty to disclose such corrupt conditions to the public and made without any malice to the Respondent; that the program was used as a means to carry out public responsibility by calling the attention of the public to conditions affecting their welfare.

B. A Member of the United States Congress is privileged for statements made pursuant to the performance of his public duties, *United States* v. *Thomas Johnson*, ... U. S. Court of Appeals, 4th Cir., ...; Article 1, Section 6, U. S. Constitution. The Constitution states as follows:

> "The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*" (Emphasis supplied.)

The principle applies whether the Member is speaking in the House of Representatives or extends his remarks outside of that Chamber, *United States* v. *Thomas Johnson*, *supra*, U. S. Court of Appeals, 4 Cir., *supra;* Article 1, Section 6, U. S. Constitution. The Court in the *Johnson* case quotes from *Coffin* v. *Coffin*, 4 Mass. 1, as follows: "I do not confine the Member to his presence in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chambers."

Those who are the objects of abusive speeches may claim that there was an unworthy purpose, but that does not

vitiate the privilege. Justice Frankfurter in *Tenney* v. *Brandhove*, 341 U. S. 367, states as follows:

> "*The claim of an unworthy purpose does not destroy the privilege.* Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U. S. 367, 377. (Emphasis added.)

Good faith or bad faith of the Member making the speech is immaterial. *Cochran* v. *Couzens*, 42 F. 2d 783 (D. C. Cir.), *cert. denied*, 282 U. S. 874. The Court in the *Cochran case* stated:

> "It is manifest that the framers of the Constitution were of the view that it would best serve the interests of all the people if members of the House and Senate were permitted unlimited freedom in speeches or debates. The provision to that end is, therefore, grounded on public policy, and should be liberally construed. Presumably legislators will be restrained in the exercise of such a privilege by the responsibilities of their office. Moreover, in the event of their failure in that regard, they will be subject to discipline by their colleagues." 42 F. 2d 783, 784.

It is not rational to contend that, because the statements were repeated on television Petitioner had lost his privi-

lege. There is no relevant difference between communication of Congressional speeches by the printed pages of the Congressional Record and communication of them through the facilities of television. The fact that the substance of the matter given on the television program was precisely the same as that stated to the Congress indicates that Petitioner had remained within the bounds of his privilege, and a state libel law cannot limit the performance of Congressional duties.

Conclusion.

WHEREFORE, Petitioner urges the grant of this petition, not solely that justice be done in his case, but that the law may be more truly ascertainable in all cases such as his.

HENRY R. WILLIAMS
GEORGE D. COVINGTON
Attorney for Petitioner.

APPENDIX.

Per Curiam Opinion of the Court of Appeals.

BE IT REMEMBERED, that on the 16th day of April in the year of our Lord one thousand nine hundred and sixty-four, Adam Clayton Powell, Jr., the appellant—in this cause, came here unto the Court of Appeals, by Chance & Mitchell, his attorneys and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the first Judicial Department. And Esther James, the respondent—in said cause, afterwards appeared in said Court of Appeals by Raymond Rubin, her attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals, this cause having been submitted, after due deliberation had thereon, did order and adjust that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Judgment of the Supreme Court of the State of New York, County of New York.

Adam Clayton Powell, Jr., the above named defendant, having appealed to the Court of Appeals from an Order of the Appellate Division, First Department, entered in the office of the Clerk of said Appellate Division on the 15th day of March, 1964 which Order modified and affirmed as modified a judgment entered in the Office of the Clerk of the County of New York on the 5th day of April, 1963, in favor of the plaintiff and against the defendant in the sum of $46,739.35, and the Court of Appeals having by an Order

entered in the office of the Clerk of said Court of Appeals on the 10th day of July, 1964, having affirmed the said Order of the Appellate Division with costs to the plaintiff; and a remittitur of the Court of Appeals having been duly filed herein;

Now, on motion of Raymond Rubin, Esq. attorney for the plaintiff herein; it is

Adjudged, that the Order of the Appellate Division, First Department, dated the 5th day of March 1964, be and the same hereby is in all things affirmed; and it is further

Adjudged that the plaintiff, Esther James, residing at 1744 Amsterdam Avenue, New York, New York, do recover of the defendant, Adam Clayton Powell, Jr., residing at 2368 Seventh Avenue, New York, the sum of $293.92 costs for disbursements as tax, and that plaintiff have execution therefor.

Signed and entered this 20th day of July, 1964.

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v.

ESTHER JAMES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

RAYMOND RUBIN,
Attorney for Respondent,
291 Broadway,
New York, New York, 10007.

LOUIS APPELL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WO 2-0620

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ESTHER JAMES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Esther James, by her attorney Raymond Rubin, Esq., respectfully opposes the petition that a Writ of Certiorari be issued to review the mandate of the Court of Appeals of New York entered on July 10, 1964.

Opinions Below

The *per curiam* opinion of the Court of Appeals is to be found in the appendix to the petition herein. This is the final judgment in the State of New York, where judgment was entered for the plaintiff, affirming the judgment

of the Appellate Division of the Supreme Court, First Judicial Department, which rendered a memorandum decision for a new trial unless the plaintiff agreed to a reduction of the jury's verdict to $11,500.00 as compensatory damages and $35,000.00 as punitive damages.

Question Presented

Did the Court of Appeals of New York err in affirming the jury's verdict that the defendant's libelous remarks concerning the plaintiff were made recklessly, wantonly and with indifference and in disregard of plaintiff's rights and as a result thereof not privileged.

Statement of Facts

On March 6, 1960, Adam Clayton Powell, Jr., a United States Congressman representing the Sixteenth Congressional District of New York, in the course of a commercial program sponsored by Associated Food Stores Cooperative, Inc. which was being telecast over TV Station WNTA (Channel 13) owned by NTA Television Broadcasting Corp., named the respondent Esther James as a "bag woman for the Police Department" (fols. 100 and 263) after referring to the Mafia and other criminals of the worst order (fols. 93-94 and 258). He further boasted that the Congressional Record was a "dog-gone pulpit" from which to make accusations "without any fear of suits of libel" (fols. 91-92, 255-256), forgetting that he was on television and not immune at said time. The petitioner also stated that he had given the said information concerning those alleged criminals to former Police Commissioner Kennedy of New York City but that Commissioner Kennedy was not telling the truth when he (Com-

missioner Kennedy) had denied that he had received said information (fols. 96-98, 261). The petitioner further stated that "said Esther James is still walking Washington Heights collecting money—she'll be doing it tomorrow" (fols. 99-100, 265).

Great publicity was given to this telecast of "Between the Lines" by means of newspaper advertisements (fol. 279), and by circulars given out at the many stores of the sponsor in the greater New York area, as well as by signs appearing on the windows of said stores (fols. 280-283), resulting in same being witnessed by about 320,000 viewers (fol. 247).

The record shows that following the television program as aforementioned, the respondent Esther James was spit upon (fols. 210, 598), was called obscene names (fols. 208-209, 228, 231), was threatened to such an extent that she was compelled to go over the roof of the next building in order to reach the street (fols. 355, 373-374), was shunned by her fellow church members and general society (fols. 211, 216-217, 598), and caused to be in actual fear of her life.

The record further shows that the jury found that the remarks were either made in bad faith and with malice or ill will towards Mrs. James or made recklessly and with indifference and without regard for her rights; or that the maker knew or should have known that the information which he had received concerning her was unreliable and notwithstanding the same he used it (fols. 1063-1064). The Trial Court ruled that the remarks were privileged if it were not for the foregoing (fols. 1060-1062).

The maker of said remarks—Adam Clayton Powell, Jr. —is a member of the United States Congress, Chairman of the House Committee on Labor and Education, Minis-

ter of the Abyssinian Baptist Church, the largest church in Harlem, and a person whose word has long been accepted in Harlem as the "gospel truth".

The respondent, however, is a widow who was 63 years of age at the time of the telecast, employed as a domestic, and a church going woman of excellent reputation. Her only criminal conviction occurred about 20 years before arising out of a dispute with her next door neighbor in Buffalo where she had then resided. Said neighbor had refused to permit the respondent's then five year old son to pull his kiddy-cart over the sidewalk in front of the neighbor's home but insisted upon the child going into the gutter (fol. 389). As a result, a fight ensued and the respondent was fined $10.00 (fol. 394).

The respondent was a person of good reputation known by her previous employer as well as by other members of her community to be a good woman and a person not only of whom nothing bad was said or known, but in addition whose public spirited acts were such as to be officially recorded in the records of the Police Department of the City of New York (fols. 330-334).

The Court of Appeals of New York affirmed the judgment in favor of respondent on July 10, 1964. Judgment of Affirmance was entered in the Office of the Clerk of New York County on July 20, 1964, and service of a copy thereof with notice of entry was duly served upon Mr. Powell's attorneys on July 20, 1964. The petition for the herein Writ was filed on October 23, 1964. No order has ever been made for an extension of time within which to file the same.

REASONS FOR DENYING THE WRIT

I

The writ is untimely.

The Order of Affirmance by the Court of Appeals was issued on July 10, 1964. The Judgment of Affirmance was entered in the Office of the Clerk of the County of New York on July 20, 1964, and a copy of same with notice of entry thereof was duly served on July 20, 1964 (Appendix).

The petition for the herein writ was filed on October 23, 1964, more than ninety days since the entry of judgment, and the period within which to apply for a writ has not been extended by a Justice of this Court.

Therefore it appears that petitioner's application for a Writ of Certiorari is out of time and should be denied because it was not filed within the required ninety day period.

USCA Title 28 Sec| 2101 (c);
Rule 22 (1) of this Court;
Department of Banking v. *Pink*, 317 U. S. 264.

II

All libelous utterances are not within the area of constitutionally protected free speech.

The petitioner contends that the judgment is repugnant to the First and the Fourteenth Amendments of the United States Constitution because it allegedly restricts his freedom of expression.

If one were to consider the petitioner's contention that his remarks were privileged as a matter of law then any legislator would have the legal right to appear on any commercial television program and falsely accuse any private citizen of having committed the most infamous crimes. To give effect to said argument would be to sanction libel and rabble rousing of the worst sort.

To sanction rabble rousing, to permit the making of wild and false accusations and similar tactics by persons who are elected to the Legislature, just because they are elected to the Legislature, and without holding them in check would result in utter chaos.

There have been enough wrongs already committed under the present guise of "Congressional Immunity". To open the door wider to wrongs that cannot be righted, would be most harmful to all Americans. Monetary damages alone cannot remedy all the results of the evils so committed.

It is the duty of the Courts to protect the common citizen from any attempt to deprive him of one of his most valuable possessions—the right to go about in public with a good name—a possession that should be zealously guarded.

If ever there were an attempt to undermine the basic facets of society by giving people in public office the right to publicly defame, without rhyme or reason, the good name and practically only possession of a common citizen, this is the attempt. This attempt should be stopped now before others try to do the same.

This Court on numerous occasions has so held. *Roth* v. *U. S.*, 354 U. S. 476, 483; *Beauharnais* v. *Illinois*, 343 U. S. 250, 266.

It was only because the petitioner's libelous remarks were either made in bad faith or made recklessly and with indifference and without regard for the respondent's rights that the jury found that Mr. Powell had forfeited his privilege, if any (fols. 1060-1064).

The recklessness and wanton indifference on the part of the petitioner in making the telecast charges are reflected by the complete absence of any proper investigation of the charges before the petitioner made his libelous calumny.

This fact was demonstrated to the jury in the person and by the testimony of the alleged investigator. The fact is that no investigation was conducted and if there had been one, it would have established that the respondent was a public spirited citizen, active in combating these criminals. But the petitioner knowing that no investigation had been conducted and in complete disregard of respondent's right as a citizen to preserve her own good name, telecast to hundreds of thousands of viewers the charge that the respondent was a criminal of the lowest order, living on the fruits of her crimes.

It would be difficult to imagine a more heinous case of recklessness than that manifested here.

For the foregoing reasons the libelous remarks were not privileged.

III

The cases cited by petitioners are not in point.

The *New York Times Co.* v. *Sullivan* case cited on pages 6 and 7 of petitioner's Writ refers to an action brought by a public official and this Court held therein that the official conduct of a public official may be subject to a

libelous attack with immunity but did not hold that a public official may make a libelous attack upon a private citizen with immunity.

The *United States* v. *Johnson* case cited on page 8 of the Writ and the *Tenney* v. *Brandhove* and *Cochran* v. *Cousens* cases cited on page 9 refer to statements made by legislators, either on the floor of the Legislature, officially or unofficially, or in committee, or by way of resolution or by an act of voting or by insertion in the printed record. The privilege referred to in the cases cited cannot be stretched to embrace a commercially sponsored television program.

In fact this Court in the *Tenney* case *supra*, held:

> "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role."

once again sustaining the reasoning contained in *Long* v. *Ansell*, 69 F. 2d 386, 389.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND BURR,
Attorney for Respondent.

Dated: New York, November 6, 1964

APPENDIX

Affidavit of Service of Judgment of Affirmance

State of New York
City of New York } ss.:
County of New York

RAYMOND RUBIN, being duly sworn, deposes and says that he is the attorney for the above named plaintiff herein. That on the 20 day of July, 1964 he served the within Judgment of Affirmance with notice of Entry upon Chance and Mitchell, the attorneys for the above named defendant by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Mail Chute—Official Depository maintained and exclusively controlled by the United States at 291 Broadway, New York City, directed to said attorneys for the defendant at No. 225 Broadway, New York, N. Y. that being the address within the State designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 21 years.

RAYMOND RUBIN

Sworn to before me this
20th day of July, 1964

GEORGE J. HAMMERMAN
Notary Public
State of New York
No. 41-1654450
Qualified in Queens Co.
Commission Expires March 30, 1965